



TOWARDS RIGHTS FOR ALL PEOPLE

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University of Nevada J.D. Candidate, John T. Niman, explores the criteria of cognitive abilities within the complexities of personhood in not only human beings, but also animals and artificial intelligences.

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I will argue three main points within this article. First, the legal concept of person ought to be based on cognitive criteria. In arguing this point, I will identify the four traditional conceptions of personhood and refute the ideas that personhood is a concept that applies to: all and only human beings; beings that reach particular stages of physical development; or all and only those beings with souls. This leads to the conclusion that those beings with certain cognitive abilities ought to be considered people under the law.

Second, if recognizing certain cognitive criteria identifies personhood, then some animals and advanced robots may qualify as persons under the law. Because some animals already possess the cognitive abilities I identify as important to legal personhood, and because some advanced robots might also one day possess these cognitive abilities, those animals and robots ought to be considered persons under the law. The inclusion of some animals and advanced robots is an extension of the current conception of human rights. However, depending on the level of cognitive ability that we require for inclusion of other beings as persons under the law, the cognitive capabilities test may force some human beings out of the definition of person. We can avoid this human-nonperson problem if we require cognitive capabilities equal to the least capable human beings that we currently consider persons under the law.

Third and finally, those animals and advanced robots that qualify for personhood under the revised definition ought to have rights commensurate with their status as persons under the law equally with other persons under the law. Because the definition of personhood I advance captures what most thinkers identify as valuable and worthy of protecting in human beings, the same justifications that drive human rights require us to grant at least some of what we currently consider human rights to those animals and robots that qualify as people under the law based on their cognitive abilities.

PART ONE: DEFINITIONS OF PERSONHOOD

I identify four potential definitions of ‘person’ and refute three of those definitions.¹ The first definition of person is “all and only human beings.” The second definition of ‘person’ is “human beings that achieve particular physical milestones of development.” Although based on the refutation of the first definition, this will collapse into a definition more properly read as “any being that achieves a particular physical milestone of development.” The third definition of person is “all and only those beings with souls.” I will conclude by arguing that the proper definition of person is “any being that is self-aware and exhibits voluntary purposive behavior.”

Some argue that the proper definition of person is the traditional idea, that all and only human beings are people. This definition is intuitive to most humans² and enjoys widespread and historical support. This position is advanced today by several humans, but perhaps never more forcefully than by attorney and ethicist, Wesley J. Smith. Smith argues for ‘human exceptionalism’ the idea that all and only humans deserve to be people because there is something intrinsically valuable and unique about human beings.³ Smith argues that this definition of person is not contingent on any abilities that a particular human might display or have, but that every human, simply by virtue of being human, ought to be considered a person and, thus, have rights.⁴ Smith allows that animals might have statutory protections, however. Others argue along with Smith that person and human are synonymous terms, and that all human beings are persons simply by virtue of being human.⁵

If personhood is not tied to any traits or abilities that humans possess, but only to the fact that a being is or is not a human, then it is important to identify what it is that distinguishes humans from other beings. Scientifically, that thing is the particular combination of DNA that humans have and other beings like chimps, whales, and mice do not. This argument is difficult to sustain, however. The human genome has been fully mapped, and we know what, exactly, DNA (human and otherwise) consists of. Scientists have also mapped other beings’ DNA, and it turns out that chimps share between 95% and 98% of the same DNA structure as human beings.⁶

¹ Niman, J. (2012). In Support Of A Legal Definition Of Personhood. 3 *Journal of Law and Social Deviance*, 142.

² I will use humans instead of people when talking about human beings because the topic demands being clear about when I am talking about human beings specifically and when I am talking about people more generally, which can include non-human beings. That ‘people’ is the word that seems more natural speaks to the deeply ingrained idea that human and person are synonymous.

³ Smith, W.J. (2010). On Human Exceptionalism: The Crazy Idea That Human Life Should Be Respected. *Lifenews.com*. Retrieved from <http://www.lifenews.com/2010/02/03/bio-3045/>

⁴ *Id.*

⁵ Leiber, J. (1985). *Can Animals And Machines Be Persons? A Dialogue*, Hackett Publishing, 6.

⁶ Paulson, T. (2005). Chimp, human DNA comparison finds vast similarities, key differences. *Seattle Post-*

Because Smith is unwilling to conclude that chimps are 95% - 98% persons, then he must insist that something in the differing DNA compels special personhood treatment for humans.

However, other studies have shown that human DNA varies even amongst members of the species by as much as .1% - .5%.⁷ Because all of those humans are still people under Smith's definition, what makes humans persons and other beings not must rest in the 1.5% - 4.5% of DNA that does not vary among human beings. Unfortunately for Smith's argument, because we have mapped human DNA completely we know that the relevant portion is constructed in the same way as the rest of the DNA; there is no special 'personhood' molecule of DNA that demands recognition, but only combinations of DNA that result in certain traits and abilities being expressed. That there is no 'personhood molecule' in DNA means that human DNA is no more special than any other DNA. Our DNA is what literally makes us human. Comparing human DNA to chimp DNA is like comparing helium and hydrogen; neither is more morally significant, they are just constructed of the same things in different amounts (amino acids for DNA - protons, neutrons, and electrons for atoms.) This means that the idea that personhood can be granted merely because a being is human is wrong, though it still allows for the idea that beings (including humans) with particular traits or abilities might be persons where others are not, a concept I will explore at the end of this section.



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The second potential definition of personhood argues that humans that meet particular physical milestones are people whereas others are not. Examples of these milestones include conception, heartbeat, brain activity, viability, and birth among others. Although it is outside the scope of this article to exhaustively review each of these possible definitions of personhood, I will illustrate through the idea of conception why the remainder of these definitions fail. Many pro-life advocates⁸, as well as Georgetown Law Professor, Charles Lugosi⁹, advance that

Intelligence. Retrieved from <http://www.seattlepi.com/local/article/Chimp-human-DNA-comparison-finds-vast-1181942.php>.

⁷ Weiss, R. (2005). Scientists Find A DNA Change That Accounts For White Skin. Washington Post. Retrieved from <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/15/AR2005121501728.html> and National Human Genome Research Institute, National Institutes of Health, Genetic Variation Program Interview, (2011). Retrieved from <http://www.genome.gov/10001551#1>

⁸ UnbornPerson.org, (2011). A Philosophical Discussion On The Personhood Of Pre-Born Human Beings. Retrieved from <http://www.unbornperson.org/>

⁹ Lugosi, C. (2006). Conforming To The Rule Of Law: When Person And Human Being Finally Mean The Same Thing. 22 ISSUES L. & MED, 119, 127.

personhood attaches at conception. The essential argument runs something like this: A human being is created at conception, all human beings deserve rights, therefore personhood attaches at the moment of conception. Previously, I demonstrated why simply being human is insufficient for granting personhood. Without the human requirement, the conception argument falls apart; all mammals (and potentially all animals) are conceived at some point, but we do not take the conception of a chipmunk (*per se*), to then require that a chipmunk has rights. Indeed, the development-based concept of personhood really requires the minor premise (that all humans deserve rights) to remain sensible, and that minor premise was refuted in the first section.

The third definition of personhood depends on ensoulment and argues that all and only those beings with souls are people. Unsurprisingly, religious people, most notably St. Thomas Aquinas and other early Christians¹⁰, have largely championed this definition. This definition has the benefit of not necessarily including only human beings; any being with a soul would, under this definition, be equally a person. When one has faith in a religion that dictates that a God-creator infuses bodies with souls and that those souls will live on eternally after bodily death, it makes sense to ascribe what is really important about personhood to that soul. This sensibility influenced English common law after Aquinas tied ensoulment to quickening¹¹ by holding that abortion prior to quickening was a misdemeanor, while abortions after quickening were criminalized.¹² Early American law followed English Common Law and punished post-quickening abortion.¹³ Philosopher René Descartes likewise argued that the mind and the body are divisible, and that human beings could exist as a thinking thing (roughly, a soul) without a body.¹⁴ Descartes, like others of his time, did not believe that animals had souls however, and so felt free to vivisect still living animals for experiments because he believed that without a soul these animals, though apparently in pain, did not actually feel pain; the animals were instead merely complicated automata.¹⁵

The problem with this definition of personhood is not conceptual; indeed, it is possible that this definition is correct, that the soul is what is actually valuable about persons and therefore, all and only those beings with souls are people. Instead, the problem with this definition is practical. Souls are, by definition, immaterial objects.¹⁶ Because souls are immaterial they are immeasurable and undetectable. A long-standing philosophical problem involves trying to determine whether, and when, a soul attaches to a particular body.¹⁷ It is likewise possible that more than one soul attaches to a body at different times, or that each body is something like a conduit for a continual stream of souls.¹⁸ Because it is impossible to detect whether a being has a soul or not (human or otherwise), even if this is in fact the correct definition of personhood, it cannot be the legal definition for personhood. Evidence is required to

¹⁰ Furrow, B.R. et. al. (2008). *Health Law: Cases, Materials, and Problems* 6th Ed. West Publishing Company, 1188.

¹¹ *Id.*

¹² *See, supra*, p. 36 note 88.

¹³ Lugosi, *supra*, at 63.

¹⁴ Hatfield, G. (Summer 2011 Edition). René Descartes, *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.). Retrieved from <http://plato.stanford.edu/archives/sum2011/entries/descartes/>

¹⁵ *Id.* at “The New Science.”

¹⁶ Merriam-Webster Inc. (2011). Soul, *Encyclopedia Britannica*. Retrieved from <http://www.merriam-webster.com/dictionary/soul>

¹⁷ Locke, J. *An Essay Concerning Human Understanding*. Chapter 27 “Of Identity and Diversity”, 218-219.

¹⁸ *Id.* Perry, J. (1978). *A Dialogue On Personal Identity and Immortality* 9–18. Hackett Publishing Company.

determine whether a particular being is or is not a person, and souls, because of their immateriality, cannot serve this evidentiary function. Having argued against three definitions of personhood, I will now argue for personhood based on cognitive criteria.

If personhood is not restricted to humans (intrinsically, or at some stage of development) and is not tied to a soul, then what is it about humans that seems intrinsically worth protecting with rights and, thus, justifies granting them personhood? French philosopher and co-drafter of the Universal Declaration of Human Rights, Jacques Maritain's, argument in *Man and the State* focuses on human intelligence, free will, and the need to fully realize one's potential as the dictates of natural law and, thus, the basis for human rights.¹⁹ American Philosopher, Alan Gerwith, likewise ties (human) rights to the need for a being capable of voluntary, purposeful, rational action to fulfill their freedom and well-being; because all agents that so qualify likewise have a need to fulfill their freedom and well-being, the rights to do so is universal.²⁰ Philosopher Vincent Samar ties personhood to rationality²¹ and morality.²² What each of these definitions has in common then, is the idea that beings with self-awareness and the ability to desire things rationally are the key factors in discovering personhood, and that people's rights ought to be protected.

Problems inherent in specifically identifying what "self-awareness" (or for that matter, whether humans have it), and/or "rational" means, and whether or not "morality" (if there is such a thing²³) is critical to personhood or not, exists. Yet, the common-sense concepts these words attempt to identify seem to be the very important parts of a human being that rights seek to protect. Despite the difficulties, I will attempt to define these terms (for the purposes of this article at least).



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¹⁹ Mureno, B. (2003). *Maritain and the Universality of Human Rights* in William Sweet Philosophical Theory and the Universal Declaration of Human Rights. University of Ottawa Press, 114.

²⁰ Walters, G. (2003). *MacIntyre, Gerwith, and Moral Indeterminacy* in William Sweet Philosophical Theory and the Universal Declaration of Human Rights. University of Ottawa Press, 189-190.

²¹ Samar, V. (2008). Abortion: The Persistent Debate and Its Implications for Stem-cell Research. 11 J.L. & Fam. Stud, 133, 145.

²² *Id.* at 135-36.

²³ Sinnott-Armstrong, W. (Fall 2011 Edition). "Moral Skepticism", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.). (Surveying arguments against the existence of morals.) Retrieved from <http://plato.stanford.edu/archives/fall2011/entries/skepticism-moral/>

Self-awareness is generally self-explanatory: the state of being aware of oneself.²⁴ However, other definitions are possible and the general idea of consciousness, of which awareness is generally a synonym, is one of the most argued concepts in all of philosophy.²⁵ Neither philosophers nor scientists have devised a method of determining whether or not a being is actually conscious / aware; this includes human beings, for which philosophers argue that it is at least possible that human beings (or more pointedly, every other human being but themselves) are zombies.²⁶ For the purposes of this paper, I will hold animals and robots to the same standard as other human beings; it is enough for them to seem to be aware of themselves and the world.

Rationality has been a crucial component of personhood since at least the sixth century.²⁷ Rationality remained central to the idea of personhood throughout the later centuries and remains a core component of most all definitions of personhood today.²⁸ Broadly conceived, rationality is the ability to understand the world, to make plans based on the state of the world, and to show some degree of intelligence.²⁹ The crucial element of rationality is not cold logic, but instead a demonstration of intelligence. Many of the same problems that give rise to philosophical zombies appear here as well (for if a being is not conscious, it cannot be rational) and so the test, at least for the purposes of this paper, is identical: Any putative person must at least appear to be intelligent. Some modified definitions will also be discussed below.

Morality, as an indicator of personhood, is important to fewer definitions than either self-awareness or rationality. There are two main conceptions of morality's importance to personhood. One is that only people are worthy of "moral consideration" and hence, rights. Under this conception, personhood is identified by other factors like awareness and rationality, and once determined to be a person the being is considered worthy of moral consideration. This was Kant's view³⁰, and roughly the view that I am espousing throughout this paper without invoking the 'moral' word; some beings are worthy of moral consideration because they are people, and those beings ought to be granted that consideration via the legal mechanism of rights. A second view is that a person must be capable of making moral decisions, of recognizing right and wrong, and of acting accordingly.³¹ The difficulty, to my mind, is that this is just a complicated way of saying that beings have to be able to make decisions (broadly, are rational) and then tacking on the proviso "in accordance with some moral scheme." Still, if a being is capable of acting morally then they are, by definition, acting rationally; therefore acting morally may not be *necessary* for personhood, but it would be *sufficient* for personhood given this set of criteria.

²⁴ Van Gulick, R. (Summer 2011 Edition). "Consciousness", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), Retrieved from <http://plato.stanford.edu/archives/sum2011/entries/consciousness/>

²⁵ *Id.*

²⁶ Kirk, R. (Spring 2012 Edition). "Zombies", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), Retrieved from <http://plato.stanford.edu/archives/spr2012/entries/zombies/>

²⁷ Farah, M.J. and Heberlein, A.S. (2007). "Personhood and Neuroscience: Naturalizing or Nihilating?" *The American Journal of Bioethics* 7(1) 37-48 at 37. Retrieved from http://repository.upenn.edu/neuroethics_pubs/36

²⁸ *Id.*

²⁹ *Id.* at 37-38.

³⁰ *Id.*

³¹ Samar at 145.

This list of traits is hardly exhaustive; other possibilities exist.³² Still, I think that at least these traits are vital to personhood, and that in fact these traits underlie any possibly important additional traits. For instance, some people argue that emotional processing is important for personhood.³³ However, in addition to the zombie problem that suggests that we need only care whether or not some being *seems* to feel emotions, emotions themselves seem to be just ways of reacting to particular stimuli. For instance, a human that seems sad after the death of someone to whom the human was close indicates to the rest of us that that a human is capable of feeling emotion. I will demonstrate later why it is difficult to strictly apply even these basic traits when determining personhood and argue that we may not want to set the bar any higher. For the time being, I will note that emotional processing is probably entailed within the concept of rationality, though more could be said about the exact relationship between emotions and rationality in another paper. For human beings, we tend to grant personhood; after all, we are the best exemplars of people we know. Particular human beings do not necessarily manifest all of these traits; sociopaths are generally incapable of moral decision-making and comatose patients are neither rational nor self-aware. Yet, most rights-based discussions want to include even those human beings who do not manifest the necessary traits for personhood in the protection offered by human rights. I will discuss the potential problems with that view in the next part. For now, it is enough to recognize that human rights are based on a need to protect beings that are self-aware, rational, perhaps moral, and not because a human being is just human, or because they have passed a particular stage of development, or because they have a soul. Cognitive criteria most clearly identify what it is about human beings we seek to protect with rights; they are the things that make us people.

PART TWO: SOME ANIMALS MAY BE PEOPLE

Based on Part One, the cognitive traits of self-awareness, rationality, and morality have been identified as the hallmarks of a person; those beings that have them are persons, and those that do not are not. It should then be straightforward to say that some animals possess some or all of these traits and that they are therefore people (or, conversely, that the animal does not possess all or some of these traits and they are therefore, not people.) Unfortunately, the task is not so straightforward. The problem is one of hypocrisy; we determine, by fiat, that nearly all human beings are people when it is clear that at least some humans that we consider people do not manifest some or any of these traits. We are then forced to ask ‘how much’ of these traits a being needs to have before they are considered a person and, if the answer to that question is applied fairly, we risk defining some humans out of personhood. The remainder of part two will explore what quantities of these cognitive capabilities are required when determining whether a being has crossed the personhood threshold or not.

Those who argue that humans, and only humans, ought to have rights could potentially achieve their goal by agreeing with everything I have said so far, but by setting a high bar for the level of cognitive ability necessary. Philosophy Professor, Peter Carruthers, states for instance, the following:

³² Farah, M.J. and Heberlein, A.S. (2007). “Personhood and Neuroscience: Naturalizing or Nihilating?” *The American Journal of Bioethics* 7(1) 37-48 at 37. Retrieved from http://repository.upenn.edu/neuroethics_pubs/36

³³ Gregersen, N.H. (2000). *The Human Person In Science and Theology* at 41-42. Continuum International Publishing.

In order to have the kind of intelligence necessary to be a rational contractor, it is not enough to have beliefs and desires, and to be able to construct long-term plans in light of those beliefs and desires. You must also have an idea of what it is to act under a general rule, and of what it might be like if all were to act under the same rule. This will require that you have a conception of the beliefs and desires of others, and that you are able to work out what might be expected of those others in particular cases if the rule in question were implemented. So rational agency requires, not just beliefs and desires, but beliefs about beliefs and desires – second-order beliefs, in fact.³⁴

This sort of definition is very particular, but not necessarily problematic on its face. The problem comes when one seeks to apply this test equally across putative persons. It seems clear that a whole host of human beings would fail to meet this standard of rational agency; among them infants (and probably toddlers or other older children as well, if the understanding of other's beliefs is expected to be accurate), those with Alzheimer's disease, various long term memory ailments, those who are comatose, the severely mentally retarded and others. Some philosophers are willing to bite the proverbial bullet and define some human beings out of personhood. Australian Philosopher, Peter Singer, is famous for his argument against infants as people; one statement he made in arguing that is:

Infants are sentient beings who are neither rational nor self-conscious. So if we turn to consider the infants in themselves, independently of the attitudes of their parents, since their species is not relevant to their moral status, the principles that govern the wrongness of killing non-human animals who are sentient but not rational or self-conscious must apply here too.³⁵

If Singer is right, and I assume that he is since he is merely arguing that the standards we set for humans and animals ought to be applied equally, then Carruthers' definition defines many human beings out of personhood. Carruthers gets around this via blatant hypocrisy by arguing that all humans should be people, whether or not they are rational actors, because treating some humans as less than people would lead to some humans treating other humans without the proper level of respect.³⁶ Infants and the elderly, Carruthers argues, "share human form" with those who are rational agents and therefore ought to be treated as if they were rational agents whether or not they actually are rational agents.³⁷ If only cows and dogs *looked like people*, Carruthers seems to argue, they ought to be treated *as if they were people* whether or not they *are people*. Sadly, cows and dogs look like cows and dogs, and so they have to prove their personhood. Carruthers' argument is, in short, a well-disguised argument for the 'all and only humans' definition of personhood. Even though he gives a nod to cognitive abilities, because he refuses to use the same

³⁴ Carruthers, P. (1992). *The Animals Issue: Moral Theory in Practice* Cambridge University Press, 137.

³⁵ Singer, P. (1993). *Taking Life: Humans* Excerpted from *Practical Ethics*, 2d Edition. Cambridge, 175-217. <http://www.utilitarian.net/singer/by/1993----.htm>

³⁶ Carruthers at 164.

³⁷ *Id.* at 163.

test for all putative persons his nod is little more than sleight of hand to distract from the real substance of his argument; that only humans deserve rights.

If an exacting definition like Carruthers' defines more humans out of personhood than we would like, perhaps a less stringent definition is needed. Carruthers' definition is not as stringent as it could be; a definition that requires Einstein-levels of intelligence would clearly define out most all humans from personhood. Even a definition that requires roughly the levels of rationality, self-consciousness, and morality displayed by the average human by definition rules out half of humans as below average. Carruthers' definition, instead, likely applies to most people. The definition removes many people from personhood, but very likely the majority of humans are capable of the sort of mental gymnastics Carruthers' definition requires. Instead, if the goal is to include as many humans as possible into the definition of person, then what we need is a minimally restrictive definition of personhood. If a being displayed the levels of self-awareness, rationality, and morality of an infant or a victim of Alzheimer's, for instance, we may want to call them a person so that infants and victims of Alzheimer's are, themselves, considered people. Such a definition would include all humans; potentially even fetuses. This might cause controversy in those countries around the world that allow abortion including the United States, though a more restrictive definition, as suggested above, would likely also cause much controversy. Even a graduated definition of personhood, where a being becomes more of a person the more like an average human being they become, could cause controversy since infants and the sick would be minimally people. On the other hand, perhaps we consider them minimally people now?

The ever-present trade-off is between making a definition of person that includes all the human beings we want to cover while not covering those entities that we do not think are people. If we assume that it is more important to include all humans, then the less restrictive definition is more appropriate. If instead, keeping the standard high to avoid granting animals and/or advanced robots personhood status is more important, then a more restrictive definition is preferable. I tend to think that the former is more important than the latter. So, what would rights discourse look like if we applied the less stringent definition to animals and robots?

Under the less stringent definition, a being need only be as rational, self-aware, and morally capable as a newborn infant or a comatose human being – a very permissive definition indeed. Even with a definition like this however, animals, robots, and humans are not readily comparable. Identifying rationality, self-awareness and morality in animals and robots means that the humans observing must recognize what they see, and for concepts as abstract as these it is all too easy to write off displays of what seem like rationality, self-awareness, and morality as mere tricks. Carruthers for instance, admits that he assumes all birds and mammals are sentient³⁸ and even that all mammals have beliefs and desires.³⁹ He then writes off animals as able to plan (and, hence, as rational and self-aware) because they do not plan often enough, or in enough different ways.⁴⁰ Squirrels that meticulously collect and store nuts in the summer and fall for the impending winter do not really plan ahead, according to Carruthers, because such displays “may be merely an acquired habit or ... innately determined.”⁴¹ He does not however, go on to say

³⁸ Carruthers at 58.

³⁹ *Id.* at 133.

⁴⁰ *Id.* at 134-135.

⁴¹ *Id.* at 134.

that there is any proof that these actions are just acquired habits or innately determined. In short, Carruthers attempts to explain away various animal behaviors by moving the bar whenever they get close to meeting his definition of rationality, self-awareness, and morality. We see similar goalpost moving when talking about artificially intelligent robots.

There have been a host of activities that people said were marks of true intelligence and that a computer could never do; write a song, play chess, win at Jeopardy!. Yet, computers have written songs⁴², they've long ago won at chess (indeed, better-than-human chess playing programs are now virtually free),⁴³ and they have recently embarrassed the very best human Jeopardy! players.⁴⁴ Yet, for all this, computers are not generally considered intelligent enough to be people (even when they win against undisputed people); those that seek to explain the machine accomplishment as mere tricks continually push the bar that would allow them entry back. Computer Science Professor Michael Kearns makes the point succinctly when he says "As soon as someone gets a computer to do it, people say: 'That's not what we meant by intelligence.' People subconsciously are trying to preserve for themselves some special role in the universe."⁴⁵

In animals, this sort of explaining away is even more pronounced. There are a host of interesting tidbits that humans generally are not willing to accept as proof that animals are rational, self-aware, moral creatures. Take, for instance, the following quote from *New Scientist* about whales and emotions:

It turns out that humpback whales, fin whales, killer whales, and sperm whales possess spindle cells in the same area of their brains as spindle cells in human brains. This brain region is linked with social organization, empathy, intuition about the feelings of others, as well as rapid, gut reactions. Spindle cells, once thought to be unique to humans and other great apes, are believed to be important in processing emotions. And whales actually have a lot more of them than humans do.⁴⁶

If this is right, and if the spindle cells work the same way in whales as they do in humans, then the fact that they have more cells for processing emotions than humans do suggests that whales are either better at processing emotions or process a wider array of emotions. Perhaps both. Additionally, if emotional processing is indicative of rationality, and if the concept of self-awareness is entailed in the concept of rationality, then this discovery is all that we should need to determine that these types of whales fulfill the major requirements of personhood and ought to be recognized as people.

⁴² Wilson, C. (2010). I'll Be Bach. Retrieved from Slate.com.

http://www.slate.com/articles/arts/music_box/2010/05/ill_be_bach.html

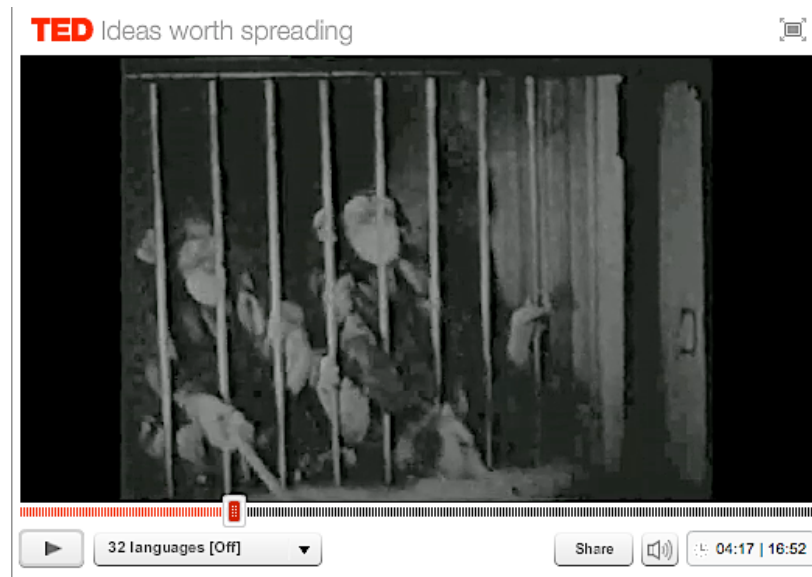
⁴³ Weber, B. (1996). Mean Chess-Playing Computer Tears At Meaning Of Thought. *The New York Times*. Retrieved from http://www.rci.rutgers.edu/~cfs/472_html/Intro/NYT_Intro/ChessMatch/MeanChessPlaying.html

⁴⁴ Silverman, M. (2011). Engineering Intelligence: Why IBM's Jeopardy-Playing Computer Is So Important. Mashable.com. Retrieved from <http://mashable.com/2011/02/11/ibm-watson-jeopardy/>

⁴⁵ Kearns, M. (2012). The AI Effect. *aaai.org*. Retrieved from <http://aaai.org/AITopics/AIEffect#kearns>

⁴⁶ Waldau, P. (2011). *Animal Rights What Everyone Needs To Know*. Oxford University Press, 16.

We also know that animals often react to the world in ways remarkably like human beings; that is why scientists frequently use animals for experiments meant to shed some insight on a disease that affects humans, or to understand better the behavior of humans. Human psychology, for instance, has benefited greatly from studying rats in cages.⁴⁷ What might it suggest about rats if we study them to understand our own brains better? Dutch Primatologist, Frans de Waal, very recently gave a talk explaining some of his research into animal morality. The pillars of morality, Dr. de Waal says, are reciprocity and empathy, demonstrated as fairness and compassion.⁴⁸ Dr. de Waal argues that his research shows that chimpanzees and bonobos reconcile with each other after fights (with bonobos reconciling with something like make-up sex.)⁴⁹ Chimpanzees have been shown to cooperate since experiments in 1937 (below), even when one chimp is less interested in the task.⁵⁰



Dr. de Waal's TED Talk, April 10, 2012
<http://www.youtube.com/watch?v=GcJxRqTs5nk>

This particular clip of the video shows that chimps (or, at least, these chimps) understand that they need help, and are willing to help even when they are not particularly interested in the result; this seems a lot like planning to me. Elephants have been shown to act in very similar ways, even using alternative techniques to achieve their goals, which seems to counter Carruthers' objections noted earlier.⁵¹ Dr. de Waal also shows that yawn contagion (that is, yawning when others are seen yawning) is correlated with empathy in humans, and acts the same way in chimpanzees.⁵² Yawn contagion is the technical term for a well-known event; when humans see another human yawn, they themselves can rarely keep from yawning. The link

⁴⁷ *Id.* at 17.

⁴⁸ de Waal, F. (2012). Moral Behaviors In Animals. TED.com. Retrieved from <http://www.truthconduit.com/frans-de-waal-moral-behavior-in-animals-video-on-ted-com/>

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

between yawn contagion and empathy (a form of emotion) is well documented.⁵³ That chimps react as humans do suggests that chimps share at least some of the emotional processing ability of humans. Chimps have been shown to care about the wellbeing of others, though this behavior seems to be mitigated by how the other acts towards the chimp.⁵⁴ Other monkeys have been shown to have a sense of fairness.⁵⁵ Some monkeys have even shown a propensity for understanding the difference between real English words and fake ones.⁵⁶ It seems then, that at least some animals meet the criteria for personhood at a greater than minimally human level.

At least one more consideration needs to be addressed before moving on to part three. Given that some animals in experiments seem to demonstrate the necessary cognitive capabilities for personhood, how broadly ought we to apply those results? Stated slightly differently, ought we grant personhood to all primates, to all primates of the groups of monkeys that were tested, or just to those monkeys that were tested in particular? In some ways, this question parallels Carruthers' argument earlier; that we ought to grant all (or nearly all) human beings personhood status even though some individual members of the human race do not themselves qualify for personhood status. In one sense, if we admit that an individual does not himself qualify for personhood but we grant it to him anyway on the basis of membership in a species that generally qualifies for personhood then we seem to be explicitly lying about the personhood of that individual; they demonstrably do not qualify for personhood, but they are considered people anyway. On the other hand, applying a personhood test of some kind for each individual human being that wishes to qualify for personhood seems like a logistical nightmare, and one that seems like an unjustified expense given that the vast majority of humans will pass the test (probably every human that realizes they need to take the test has already demonstrated enough self-awareness and rationality to pass the test.)

Expanding this individual test out to animals would compound the difficulty and expense. Yet, we risk granting personhood to an entire species of monkeys on the basis of a few dozen experiments; perhaps those monkeys tested were something like monkey Einsteins and the others do not qualify for personhood status? I think ultimately that even if this objection is true, it does not really matter. Granting personhood to an entire species of animal, or to all of humanity because most members meet the criteria for personhood lends itself more easily to the legislative process. Granting personhood to the least capable humans defeats the problem of defining some humans out of personhood; those humans in comas or the newborn would still be people, even though they do not individually qualify for personhood, just because they are members of a species where the vast majority of the members do qualify for personhood. This maintains the dignity and universality of human rights for all. Likewise, it allows protection of animal rights on a species-wide scale once sufficient experiments have been conducted to determine that most members of that species qualify for personhood. On the other hand, it is important to determine

⁵³ Sohn, E. (2010). *Why Is Yawning Contagious?* Discovery News. Retrieved from <http://news.discovery.com/human/yawning-social-behavior.html>

⁵⁴ *de Waal* (2012).

⁵⁵ *Id.*

⁵⁶ Yong, E. (2012). Reading Without Understanding: Baboons Can Tell real English Words From Fake Ones. DiscoveryMagazine.com 2012. Retrieved from <http://blogs.discovermagazine.com/notrocketscience/2012/04/12/reading-without-understanding-baboons-can-tell-real-english-words-from-fake-ones/>

when a being (human or otherwise) is developed enough to count as a member of the species. To take an inclusive definition might overturn abortion laws for humans (or force another justification for abortions) or require enforcement of rights for unborn animal-people (which would raise a host of issues related to knowing when animals are pregnant.) For these reasons, I suggest counting only born members of a species as people, though my argument does not necessarily require this result. As I will demonstrate in section three, recognizing a being as a person is really just a mechanism for granting those beings rights, and there are limited instances when being over-inclusive in granting rights to various beings could be problematic.

PART THREE: ANIMALS THAT ARE PEOPLE SHOULD BE GRANTED RIGHTS

Just because a being does not have legal protection in the form of rights does not mean that the being is entirely unprotected by the law. The Austrian Supreme Court ruled in 2007 that Matthew Hiasl Pan, a chimpanzee, is not a person.⁵⁷ The case (ironically) has been appealed, but not yet heard by, the European Court of Human Rights.⁵⁸ Other countries have been more progressive. The Spanish Parliament granted limited protection to chimpanzees, bonobos, gorillas and orangutans.⁵⁹ The bill makes it illegal to kill apes except in self-defense, forbids torture (including medical experiments), and arbitrary imprisonment, including circuses and films.⁶⁰ Apes in zoos need not be freed, but would be entitled to better conditions.⁶¹ In 1992, Switzerland amended their Constitution to define animals as beings and not things; this runs contrary to the usual animals as property stance.⁶² The Germans added ‘and animals’ to a constitutional clause protecting the dignity of humans, forcing courts to weigh various animal rights in their cases.⁶³ Greece, Bosnia, Bolivia, Peru and Herzegovina have banned the use of animals in circuses, Austria and Croatia ban wild animal acts, and several European countries also have measures to ban or phase out animal acts in circuses.⁶⁴ The United States, Brazil, Columbia, Chile and Ecuador are considering similar legislation.⁶⁵ Various anti-cruelty statutes across the world otherwise protect animals. In short, animals can be statutorily protected without needing rights-based protections. Yet, I argue that animals ought to be granted rights. Why?

Why do we grant rights to human beings? The most oft-cited reason, and one that carries historical significance, is that natural law demands that human beings be granted rights. One definition of such rights is that human rights are those rights fundamental to human dignity – that is, a life worth being lived.⁶⁶ Philosophers, ethicists, and legal scholars (among others) debate

⁵⁷ MSNBC.com. (2008). It’s official: In Austria, a chimp is not a person. The Associated Press. Retrieved from http://www.msnbc.msn.com/id/22670956/ns/technology_and_science-science/t/its-official-austria-chimp-not-person/#.T4onOau8YXw

⁵⁸ *Id.*

⁵⁹ McNeil, Jr., D. (2008). When Human Rights Extend to Nonhumans. The New York Times.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² USAToday.com. (2002). Germany guarantees animal rights in constitution. The Associated Press. Retrieved from <http://www.usatoday.com/news/world/2002/05/18/germany-rights.htm>

⁶³ *Id.*

⁶⁴ Animal Defenders International, Inc. (2012). Greece Bans Animal Circuses. Retrieved from http://www.ad-international.org/animals_in_entertainment/go.php?id=2528&ssi=10

⁶⁵ *Id.*

⁶⁶ Weiss, T., Forsythe, D., Coate, R., Pease, K. (2007). The United Nations and Changing World Politics. 5th edition Westview Press, 140.

whether these rights could really be explained by an appeal to natural law (that is, these rights already exist independently of whether or not they are recognized by a particular government) or whether these rights are a function of positive law (that is, rights the nation grants to its citizens via a Constitution or other legal device.) In practice, even if it is true that natural rights exist and are discovered, if a nation does not also protect rights through positive law and appropriate enforcement mechanisms, then that unprotected right exists ‘out there’ in the ether is largely irrelevant. The United Nations itself operates as though human rights are a function of positive law, generally punishing only those nations that agreed to uphold certain human rights and ratify treaties to that extent.⁶⁷ Yet, sometimes the United Nations recognizes that a human right has been violated whether or not a nation has signed onto a particular treaty; for instance, it is no defense to genocide for a country to say that they do not recognize genocide as a violation of human rights. In this, the United Nations seems to take a two-fold approach to rights. First, any nation that agrees that a particular proposition identifies a right will be expected to treat that proposition as a right by virtue of signing a treaty recognizing that proposition as a right. Second, if enough nations agree that a particular human right exists such that it becomes a norm of customary international law, then even nations that do not sign treaties recognizing that right might be expected to act as though they recognize the right or suffer punishment. All of this speaks more to why it is that human beings deserve protections as opposed to why human beings deserve *rights*. This debate has played out in the animal rights arena with some countries granting animals protections without granting them rights as such.

The main problem with this compromise (though some of the laws above are very close to granting actual rights, and so are less problematic) is that “rights” is something like a legal code word for super-protections. This is largely so because rights are seen as necessary based on natural law; recognition of rights is something that people are morally obligated to do.⁶⁸ Rightly or wrongly, we tend to view a violation of human rights as more serious than a violation of statutory law.⁶⁹ Genocide, for instance, is seen as worse than mass murder even when the act itself is functionally the same because genocide is viewed as more morally blameworthy. Arguments that the legislature must enact a law pursuant to a human right are more persuasive than arguments that the legislature must enact a law because it is the right thing to do. The concept of *rights* carries with it some normative force, and encourages legislators, and through them nations, to make changes they otherwise would probably not. This is largely a function of philosophical discussions about rights in previous centuries; rights are seen as inviolable (or, at least, were traditionally seen as such because they are moral commands) where statutes or other laws could be created, altered, and repealed at the will of the governing body because they are *just* statutory law.⁷⁰ Even today, where rights are not seen as absolute (for instance, the prohibition against libel even while recognizing a right to free speech in the United States) they are seen as super-protected. The Supreme Court of the United States, for instance, requires a strict scrutiny level of justification for laws that erode Constitutional rights, whereas a simple rational basis review is needed to alter a statute.⁷¹ While some individual nations have granted

⁶⁷ *Id.* at 147.

⁶⁸ Nickel, J. (Fall 2010 Edition). "Human Rights", *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta (ed.). Retrieved from <http://plato.stanford.edu/archives/fall2010/entries/rights-human/>

⁶⁹ Wenar, L. (Fall 2011 Edition). "Rights", *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta (ed.). Retrieved from <http://plato.stanford.edu/archives/fall2011/entries/rights/>

⁷⁰ *Id.*

⁷¹ Chemerinsky, E. (1997). "Breakdown In the Levels Of Scrutiny" The Free Library By Farlex. Retrieved from

statutory (or even Constitutional) protection to animals, none of them have gone so far as to say that animals have rights as such.

This sort of nation-by-nation ratification of statutory protections for animals suggests that worldwide sentiment is trending toward the recognition of something approaching animal rights and fulfills an important prerequisite to the positive law view of recognizing human rights. When enough countries believe strongly in the cause of animal rights, they can create and ratify treaties to protect animals in ways very similar to their already enacted national laws and, thus, grant animals rights in a positive-law sort of way. Presumably, as was the case for human rights, when many nations have ratified such treaties the rights protected by the treaties will be seen as customary international law and will eventually become binding on even those nations that do not explicitly agree to a particular treaty. Whether or not humans living at that point will then argue that animal rights have existed all along, but were only recently recognized, remains to be seen.

Is there however, good reason to argue that animal rights ought to be recognized now, whether or not other nations have enacted positive laws protecting animals? I think so. In order to show why, I first need to return to the question of why humans have been traditionally granted rights. Philosopher John Locke conceptualizes rights as necessary agreements between people to secure their interests in life, liberty, and property.⁷² His view of rights is something like a contract between people; I agree not to kill you and, in return, you have an obligation not to kill me so that we can both go about enjoying our lives. Rights are generally viewed as inviolable (or at least largely so) no matter how many other people would be benefited if those rights were to be violated.⁷³ This view is interesting for two reasons. First, it hints at why rights based protections are necessary even when statutory law might seem to offer equal protection; by calling a protection a right it is *inviolable* by other people and the government and, thus, the sort of super-protection I mentioned earlier. The second reason this view is interesting is because it is blatantly and demonstrably false.

While many philosophers viewed rights as inviolable hundreds of years ago, in practice rights are limited and defined all the time now. In the United States for instance, the right to free speech is not an absolute right; laws against libel and slander exist and are enforced, one does not have a right to yell ‘fire’ in a crowded theatre, or to make threats against the President. There are many ways in which each right granted is accepted in particular cases. Even the right to life is violable if one kills in self-defense or by order of the state (such as a prison executioner injecting a lethal concoction into a prisoner that has been convicted and sentenced to death.) Thus, rights still carry the super-protection sentiment that they held when they were inviolable but are now violable in many instances. In practice, rights remain violated in fewer instances than statutory laws because legislators (and courts) are less willing to violate them. Thus, where an argument that the legislature ought to repeal a law banning animal experimentation might be successful if it can be shown that such a repeal would do a great deal of good to humans, a right granted to animals protecting them from experimentation would presumably be resistant to the argument unless the need was exceptionally great.

<http://www.thefreelibrary.com/Breakdown+in+the+levels+of+scrutiny.-a019235623>

⁷² Bedi, S. (2009). *Rejecting Rights* Cambridge University Press, 16-17.

⁷³ Waldau at 66.

If my conception of rights is correct, then several points directly follow. The first is that we grant human beings rights instead of statutory protections because we perceive rights to be less violable than statutory protections and because we view the things protected by rights to be necessary to human beings leading a life worth being lived. The second is that rights are practically somewhat less violable than statutory protections, but in practice are violable under some circumstances. The third, then, is that we call those things we want to protect stringently rights whereas other things that we want to protect somewhat less stringently are simple laws.

Many of the things that we deem necessary to living a life worth lived are tied to the rationality, self-awareness, and morality inherent in personhood. The right to life is tied to self-awareness, and the desire for a being that is alive to continue to live. The right to liberty is tied to allowing those people with self-awareness, rationality, and the ability to make plans to execute those plans as rational agents without undue interference. Freedom of speech can be seen as enabling a rational, self-aware being to share those plans with other people such that they can work as a group. Other rights can be similarly tied to personhood status. To the extent that animals or advanced robots have the cognitive capacity necessary for inclusion in personhood, and I believe I have successfully argued that at least some animals do so qualify, the same rationality that demands we protect the personhood of human beings ought to demand that we protect the personhood of animals. Paul Waldau argues in fact, that because humans are really a subset of animals, granting other animals rights are merely an extension of the rights that a small subset of animals already enjoy.⁷⁴

Likewise, since rights are tied to personhood, it makes sense to grant rights to animals commensurate with their cognitive abilities and natures. It makes little sense to grant monkeys and whales a right to free speech for instance, since their speech, such as it is, is not curtailed now and they do not generally or directly interact with human beings in such a way that we could figure out what they are saying such that we would want to curtail their speech. Likewise, a right to education seems to make little sense. A right to life on the other hand, seems like the basic sort of right that any person ought to have and one that would be appropriately enforced against other human beings at least. It is unlikely that such rights could be enforced against other animals, but then, we do not consider a bear that eats a human to have violated the human's right to life in any meaningful sense. Likewise, a right to privacy might make sense if it can be shown that observation has some harmful side effect on primates.

Because rights are violable in some circumstances, rights for animals would presumably also be violable in some circumstances. The Spanish bill, for instance, forbids killing apes except in self-defense. Because we recognize this exception even for human beings, it seems likely that the exception is permissible for animals. However, because rights are believed to be less readily violable than statutory protections, a commitment to animal rights would evidence a stronger stance toward protecting the well being of animals. This stronger stance, I believe, flows directly from the recognition that these animals are people that share the same essential characteristics, as do human people, and that these animals' dignity ought to be equally respected and protected.

Third and finally, calling animal protection rights *just* evidences and enacts that stronger commitment to protecting personal dignity and worth in all its forms. Animals certainly could be protected by statutory rights on a country-by-country basis (their situation would be a lot better

⁷⁴ Waldau at 1.

than it is now if we did), but granting animals statutory protections and humans rights reinforces the idea that there is something different and lesser about animals. Instead, to the extent that animals are persons, we ought to recognize that they are different only in capability and not in kind. Some animals have greater cognitive ability than some humans, and so to the extent that we sympathize with the less capable humans we ought to equally, or even more strongly, sympathize with animals. This sympathy ought to be backed by legal protections in the form of rights, just as the less capable humans are protected today.

Although I have largely discussed animals, all of these arguments hold equally for robots that have the cognitive capacity for personhood. Indeed, because robots can be programmed for particular tasks (or ‘learn’ new ones on their own), and are more adaptable than animals, it seems likely that in the future robots may well have more rights than most animals.⁷⁵ However, I have not seen evidence that a currently existing robot meets the criteria for personhood (though they do seem to be well on their way), and so the argument for robot rights is more of an argument that we ought to grant them rights when they are demonstrably people rather than the animal argument, which is that some are demonstrably people now and should be granted rights immediately. One usual objection to the idea that robots are people is that they are only narrowly intelligent; that is, a computer might be better than the very best human Jeopardy! players, but is utterly useless if you ask it to make a grilled cheese sandwich or write a song.⁷⁶ The attempt to build a generally intelligent artificial intelligence continues and progress is being made. For instance, some robots seem capable of displaying emotions⁷⁷; as I previously argued, *seeming to feel emotions* is as close as we can expect to come when determining whether another being (even a human) *actually* feels emotions. Other scientists have built cyborgs – robots that run on biological brains.⁷⁸ These experiments and more suggest that biological brains and artificial brains can be constructed cooperatively, such that the biological portion can control the robot portion, and that a fully artificial brain capable of the same things as a biological brain is at least possible in theory. As science continues to advance, it seems inevitable that one day a robot will be indistinguishable from a human. Once a robot is a generally capable as the least capable human beings (if, indeed, they are not already), then it seems that the robots ought to be granted rights, albeit rights appropriate to their capabilities.⁷⁹

CONCLUSION

I argued that the important components of personhood are self-awareness, rationality, and perhaps moral ability. Other definitions of personhood are inadequate because they are either inconsistent with data observed in the real world, logically inconsistent, or un-testable. To avoid

⁷⁵ Assuming that animals themselves are not enhanced; a proposition that some have argued for but is outside the scope of this article.

⁷⁶ Cole, D. (Winter 2009 Edition). "The Chinese Room Argument", *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta (ed.), Retrieved from <http://plato.stanford.edu/archives/win2009/entries/chinese-room/>

⁷⁷ Gaudin, S. (2010). *Scientists Build A Robot That Can Learn Emotions* Computer World. Retrieved from http://www.computerworld.com/s/article/9180781/Scientists_build_a_robot_that_can_learn_emotions

⁷⁸ Piquepaille, R. (2008). *Exclusive: A Robot With A Biological Brain*. Zdnet.com. Retrieved from <http://www.zdnet.com/blog/emergingtech/exclusive-a-robot-with-a-biological-brain/1009>

⁷⁹ One interesting thought that pushes the argument further: There is little reason to think that humans are the pinnacle of personhood, or that the traits that are important to personhood are at their maximum potential in humans. As science continues to advance, it seems likely that robots will one day (soon?) be more capable than human beings and, perhaps, deserving of more rights than humans. This is a thought I will flesh out more another time.

defining some human beings out of personhood, it can only make sense to require the level of cognitive abilities demonstrated by the least capable human beings. Under my definition of personhood, I demonstrated that some animals already possess this level of cognitive capability and that they should therefore, be considered persons under the law. I have also argued that some robots either do, or could, likewise meet these criteria and that if and when they do that they too, ought to be granted personhood status. I argued that it is personhood that rights are intended to protect, and that to the extent that these animals are people their rights ought to be protected as strongly as human rights are currently protected. Calling these protections rights rather than statutory protections reinforces our commitment to protect persons in whatever form we find them, and shows that we take these commitments seriously and will not seek to avoid our obligations to protect these persons when it is convenient to do so. These protections ought to be commensurate with the needs and nature of the entity holding them; a right to education makes little sense for apes, but a right to life makes a good deal of sense. Rights ought to be reconceived as personhood rights, and no longer limited to human rights.

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